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No. 98-378

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JANET B. STONE, *et al.*,
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF LABOR and
NORTH CAROLINA DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH DIVISION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
I. PETITIONERS PROPERLY RAISED BEFORE THE SUPREME COURT OF NORTH CAROLINA THE QUESTION NOW PRESENTED BY THEIR PETITION	1
A. The Principles Governing Review of Federal Issues Presented to State Courts are Well Settled	2
B. Plaintiffs Presented the Federal Issue That is Under Consideration Throughout the State Court Proceedings	5
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) 2, 3

Dewey v. City of Des Moines, 173 U.S. 193, 19 S.Ct. 379, 43 L.Ed. 665 (1899) 3, 4

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983) 3, 4

Indian Towing Co. v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955) 9

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) 5

Yee v. Escondido, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) 4

STATUTES

28 U.S.C.S. § 1257 (1990) 2

29 U.S.C.S. § 651 (1991) 5

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REPLY BRIEF FOR PETITIONERS

Janet B. Stone, and each of the other plaintiff-petitioners named in the caption of the Petition for Writ of Certiorari in this matter ("Petition"), respectfully submit this Reply Brief in Support of Petition for a Writ of Certiorari ("Reply Brief") under Rule 15.6 of the Rules of the Supreme Court of the United States for the purpose of addressing new points raised in defendants' Brief in Opposition to Plaintiffs' Petition ("Brief in Opposition").

I. PETITIONERS PROPERLY RAISED BEFORE THE SUPREME COURT OF NORTH CAROLINA THE QUESTION NOW PRESENTED BY THEIR PETITION.

Defendants' Brief in Opposition contends the federal question petitioner-plaintiffs ("plaintiffs") present is not

appropriate for review because it was not properly raised before the Supreme Court of North Carolina. (Brief in Opposition at 6-11). Yet, the appendix to defendants' own brief contradicts the position they now take. Plaintiffs have fulfilled all prerequisites for presenting the federal question.

A. The Principles Governing Review of Federal Issues Presented to State Courts Are Well Settled.

State court litigants may seek review of "[f]inal judgments or decrees rendered by the highest court of a State in which decision could be had . . . [b]y writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." 28 U.S.C.S. § 1257 (1990). Before this Court will review the decision of a state's highest court, it first examines whether the federal claim was presented below in a way that permitted the state court to render judgment on it. In *Adams v. Robertson*, the Court summarized the law as follows:

> With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. 83, ——, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (citations omitted). In determining whether it has jurisdiction, this Court first examines the opinion below:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . and the aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court had "a fair opportu-

> nity to address the federal question sought to be presented here."

Id. (citations omitted). To satisfy this requirement, a petitioner may show that "it presented the particular claim at issue . . . with 'fair precision and in due time.'" *Id.* at 1030 (citations omitted).

Adams cites earlier cases which provide guidance in determining whether a federal issue was properly presented. A federal claim will not be considered in this Court "unless it had been either raised or squarely considered and resolved in state court." *Illinois v. Gates*, 462 U.S. 213, 218, 103 S.Ct. 2317, 2321, n.1 (1983). It is not a barrier to review if the federal claim was argued below in some fashion, albeit differently than it is argued in this Court:

> In *Dewey v. City of Des Moines*, 173 U.S. 193, 197-98, 19 S.Ct. 379, 380-81, 43 L.Ed. 665 (1899), the fullest treatment of the subject, the Court said that "if the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below on a Federal question there discussed."

Id. at 220, 103 S.Ct. at 2322 (brackets in original).

Gates acknowledged that *Dewey* is the key case for evaluating whether a federal question was adequately raised below. According to *Dewey*, "the court must be able to see clearly from the whole record that a provision of the constitution or act of congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied." *Id.* at 198, 19 S.Ct. at

381, 43 L.Ed. 665 (citations omitted). *Dewey* describes how that standard is to be satisfied:

> Although no particular form of words is necessary to be used in order that the federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which, at least, would call its attention to the federal question as one that was relied on by the party, *and then, if the decision of the court, while not noticing the question, was such that the judgment was, by its necessary effect, a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law.*

Id. at 199, 19 S.Ct. at 381, 43 L.Ed. 665 (emphasis added; citations ommitted). Mere failure of the state court to address the federal issue does not, therefore, defeat jurisdiction, provided that the federal rights are "set up or claimed in such a way as to bring the subject to the attention of the state court." *Id.*

What a petitioner presents to the trial tribunal helps determine whether federal jurisdiction exists. For instance, a litigant's failure to raise a federal claim in a civil complaint may suggest the issue has not been properly presented to the state court. *Yee v. Escondido,* 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992). But where the federal issue is included in a trial court motion and argued on appeal, it is properly preserved for further review here despite failure of the state's highest court to rule on it. *Street v. New York,* 394 U.S. 576, 582-83, 89 S.Ct. 1354, 1360-61, 22 L.Ed.2d 572 (1969). Raising a federal issue in a civil complaint, and then briefing it to the state's highest court, is certainly adequate to confer appellate jurisdiction upon this Court.

B. Plaintiffs Presented the Federal Issue That Is Under Consideration Throughout the State Court Proceedings.

In their pleadings, briefs, and oral presentations, plaintiffs have unfailingly alleged and argued that defendants' negligence in discharging their duties arising under the Federal OSHA Act denied plaintiffs' their federally-protected rights. 29 U.S.C.S. § 651 *et seq.* (1990). This federal legislation establishes duties which defendants *must* discharge once they have agreed to establish and implement a State OSHA program. *See* Petition at 5-6. Defendants failed to satisfy these standards in breach of their duties under federal law. This point has been made throughout the course of the proceedings and lies at the heart of plaintiffs' claims.

Plaintiffs' specific allegations of federal law violations include the following: [1] Defendants are charged with the duty of enforcing occupational safety and health standards in North Carolina. (App. at 2a, 4a). These duties were imposed by federal and state statutes. (App. at 2a-6a). The Federal OSHA Act requires defendants to assure that their State OSHA program is at least as effective in providing safe and healthful employment and places of employment as the Federal program. (App. at 2a-3a). Federal law requires the State, once it assumes control of occupational safety and health laws, to provide sufficient legal authority, personnel, funding, enforcement, and the like to achieve for plaintiffs and other similarly-situated persons an equivalent level of protection from workplace injury as that enjoyed by persons who work where Federal OSHA personnel have enforcement responsibilities. (App. at 3a).

Plaintiffs also alleged breach of defendants' federal duties and violation of the plaintiffs' federal rights. The

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[1] Excerpts from one of the verified claims filed in this action, which is fairly representative of all such claims, are set forth in the appendix to this Reply Brief.

United States Department of Labor has the right and duty not only to give, but also to withhold or revoke, its approval of a state OSHA program. (App. at 2a-4a). In its investigation after the Hamlet fire, conducted pursuant to the Federal OSHA statutes and rules, the Department found that defendants had an insufficient number of inspectors, inspections, and programs for planned inspections. (App. at 6a-8a). The Hamlet fire investigation disclosed defendants' violations of statutory, regulatory and other duties to plaintiffs, including duties arising under the Federal OSHA Act. (App. at 6a-8a). Defendants' State OSHA program suffered from operational deficiencies that made it less effective than the federal program. (App. at 8a). As the plaintiffs alleged, "defendants failed to carry out their duties under the Federal OSHA Act, the State OSHA program, and OSHANC on a level at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act." (App. at 8a). Defendants' negligent failure to discharge those duties, despite having notice of repeated violations by this employer, of previous fires on this premises, and of existing hazards at the Hamlet plant, was a proximate and direct cause of the deaths and injuries complained of in this action. (App. at 8a-11a).

The allegations demonstrate that plaintiffs rely, in large part, upon their federal claim that defendants failed to maintain State OSHA enforcement safety standards at the the same level as the federal program. (App. at 9a). Plaintiffs pressed this federal claim in the trial division, and then in the North Carolina Court of Appeals, which held that they had stated a claim upon which relief could be granted. (Petition, App. at 22a-26a).

Defendants appealed to the Supreme Court of North Carolina, the State's highest court. Defendants devoted

a whole subsection of their brief to arguments arising from plaintiffs' Federal OSHA claims.[2]

In response, plaintiffs' brief[3] argued that the North Carolina OSHA program only came into existence by virtue of the Federal OSHA Act, under which defendants assumed the duty to implement and enforce occupational safety and health standards. (App. at 13a-15a). Federal statutes require any state with an approved OSHA program to fulfill a "continuing obligation to provide safety standards, funding, and enforcement at least as effectively as that provided under the Federal OSHA Act and Regulations. 29 U.S.C. § 667(c,f); 29 C.F.R. § 1902.3 *et seq.*" (App. at 13a). Plaintiffs argued:

> [F]ederal statutes and regulations impose on defendants a legal duty to maintain the State OSHA Program at the same level of effectiveness as the Federal OSHA Program 29 U.S.C. § 667 . . . Yet, the United States Department of Labor investigated the defendants' program as a result of the Hamlet fire and determined that they had failed to carry out their duties.

(App. at 15a). Moreover, plaintiffs showed the Supreme Court of North Carolina that defendants had an insufficient number of inspectors, inspections, and programs, as well as insufficient funding, personnel, and planning under the federal standards. (App. at 16a-17a). Plaintiffs argued that "Defendants maintained work place safety at a less effective level than the Federal program provides and requires." (App. at 16a). Moreover, the United States Department of Labor's inquiry and investigation estab-

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[2] Excerpts from defendants' brief to the Supreme Court of North Carolina, containing their argument about liability arising under the Federal OSHA Act, are set forth in the Appendix to this Reply Brief. (App. at 23a-27a).

[3] Excerpts from plaintiffs' brief to the Supreme Court of North Carolina are set forth in the appendix to this Reply Brief. (App. at 12a-22a).

lished serious violations of defendants' statutory duties under 29 U.S.C. § 667. (App. at 17a).

Plaintiffs compared defendants' inspection program at the Imperial Foods Products plant in Hamlet, North Carolina, with the Federal program at the Imperial Food Products plant in Pennsylvania. (App. at 18a). Citing federal law, plaintiffs argued that the OSHA is a remedial statute to be liberally construed in favor of its beneficiaries, and that duties arising thereunder were intended to flow to the workers they protect. (App. at 20a). Plaintiffs argued, "Where state and federal statutes and regulations require the State to take affirmative action and it fails to act, proximately causing injury to others, negligence is present. Its liability under the Tort Claims Act necessarily follows." (App. at 21a).

Plaintiffs met certain of defendants' arguments that federal law was inapplicable by stating:

> Defendants argue that the Federal OSHA Act does not create "an independent basis for a cause of action on behalf of the employee against either the plaintiff's employer or a third party who is not the plaintiff's employer." . . . Defendants' argument is off point and misapprehends plaintiffs' claims.
>
> The Federal OSHA Act and OSHANC established certain duties, violation of which can have effects both inside and outside the OSHA compliance system. For instance, committing an OSHANC violation can lead to the issuances of a citation. . . . It is also evidence of negligence in a civil suit. . . . Therefore, compliance with OSHA regulations is relevant to civil liability even though OSHA does not itself create an independent class of claims against employers.
>
> Similarly, while OSHA does not set up a new and independent class of claims against the government, it is pertinent to the State's negligence liability under another statute—the Tort Claims Act. . . .

> An independent statutory cause of action need not be created for the statute to be relevant, or even dispositive, as to the standard of care. In this case, plaintiffs were injured by defendants' failure to fulfill both their statutory duties and their duties of reasonable care owed to plaintiffs—members of the work force who are the beneficiaries of OSHANC. . . . As such, defendants are liable under the Tort Claims Act.

(App. at 21a-22a).

Plaintiffs continued to press the federal question in their Petition for Rehearing to the Supreme Court of North Carolina (App. at 28a-37a), alluding to defendants' continuing obligation to provide safety standards, funding, and enforcement at least as effective as provided under the Federal OSHA Act and Regulations. (App. at 29a-30a). Defendants had "asked the federal government to stay out of [the] business [of enforcing occupational safety and health laws] in North Carolina and, in exchange, voluntarily assumed an external standard of measurement—the requirement that their program be at least as effective as the federal OSHA program. 29 U.S.C. § 667(c,f); 29 CFR § 1902.3." (App. at 35a). Moreover, plaintiffs showed that decisions by this Court (particularly, *Indian Towing Co. v. United States of America*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955)), had repudiated under federal law the very doctrine the Supreme Court of North Carolina applied to defeat plaintiffs' claims. (App. at 30a-34a).

When the North Carolina Supreme Court permitted defendants to violate the federal standard without consequences, relying on the state law theory that they owed no duties to plaintiffs, it ran afoul of the Federal OSHA Act. State law policies cannot trump federal law, as plaintiffs have maintained throughout this litigation.

In summary, plaintiffs presented and pressed for a ruling below that recognized their entitlement to protection

by defendants equal to that provided by federal law. The Supreme Court of North Carolina wrongly allowed defendants to deny that protection by expanding and invoking the State's public duty doctrine, under which the Court concluded that defendants owed no duties to the plaintiff employees, or any other workers in North Carolina. Because this very doctrine has been rejected by this Court and other federal court decisions arising out of the Federal OSHA Act and the Federal Tort Claims Act, the North Carolina Supreme Court's reliance on the public duty to defeat plaintiffs' federal claims violates their federal rights.

Plaintiffs' Petition should be allowed and the decision of the Supreme Court of North Carolina reversed, not only to help redress the grievances of the victims of one of the Nation's worst industrial disasters; but also to avoid subjecting all industrial workers in the country's tenth most populous state to a continuing denial of their federal right to be treated equally with workers who toil in jurisdictions where OSHA is federally enforced.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, the decision of the Supreme Court of North Carolina reversed, and this case remanded for further proceedings not inconsistent therewith.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

Verified Claim of William Kelly, Jr., dated 24 August 1993

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. TA-13053

WILLIAM KELLY, JR., Administrator of the Estate of BRENDA GAIL KELLY, Deceased,
Claimant,

v.

NORTH CAROLINA DEPARTMENT OF LABOR, and NORTH CAROLINA DEPARTMENT OF LABOR, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,
Defendants.

VERIFIED CLAIM

Claimant, William Kelly, Jr., by and through his undersigned counsel, alleges and says as follows:

THE PARTIES AND DEFENDANTS' OFFICERS, EMPLOYEES AND AGENTS

1. Claimant, William Kelly, Jr., is the duly authorized administrator of the estate of Brenda Gail Kelly, deceased, and is a resident of Richmond County, North Carolina. A copy of the Letters of Administration certifying William Kelly, Jr., as the administrator of the estate of Brenda Gail Kelly is attached as Exhibit A, Letters of Administration, Richmond County, 91-E-219.

2. Defendant the North Carolina Department of Labor (sometimes "D.O.L.") is a political subdivision of the State of North Carolina.

3. Defendant the Division of Occupational Safety and Health, also known as the Office of Occupational Safety and Health (sometimes "North Carolina OSHA") is a political subdivision of the State of North Carolina and is an office within the North Carolina Department of Labor responsible for promulgation and enforcement of workplace safety standards, and for the performance of duties under the Occupational Safety and Health Act of North Carolina (sometimes "OSHANC") and other applicable laws.

* * * *

THE DUTIES AND THE NEGLIGENT ACTS AND OMISSIONS OF THE DEFENDANTS

24. Defendants owed duties to the decedent Brenda Gail Kelly and to William Kelly, Jr., administrator of her estate, which were imposed by federal and state statutes and regulations and by the common law, and which defendants negligently breached proximately and directly causing the death of Brenda Gail Kelly and causing the claimant to suffer damages, amounting to an unreasonable, oppressive and manifest abuse of defendants' discretion. The claimant incorporates the allegations contained in paragraphs 1 through 23 of this Verified Claim herein, and makes additional allegations below.

Duties of Defendants

25. In 1970, the Congress of the United States enacted and the President of the United States signed into law the Occupational Safety and Health Act of 1970, codified at 29 U.S.C. § 651 *et seq.* (sometimes "Federal OSHA Act").

26. Under 29 U.S.C. § 667, a section of the Federal OSHA Act, a state may assume responsibility for development and enforcement of occupational safety and health standards on certain terms and conditions, provided that the state's program (someimes "State OSHA Program")

is or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

27. Under 28 U.S.C. § 667, a State OSHA Program must provide sufficient legal authority and qualified personnel necessary for enforcement of such standards.

28. Under 28 U.S.C. § 667, a State OSHA Program must have adequate funds devoted to the administration and enforcement of such standards.

29. Under the Federal OSHA Act and relevant federal regulations, including 29 C.F.R. § 1901.1 *et seq*, it is the continuing duty of those states with a State OSHA Program to provide safety standards, funding, and enforcement at least as effective as the standards, funding and enforcement provided by the Federal OSHA Act and the regulations promulgated thereunder.

30. Pursuant to federal regulations located at 29 CFR § 1901.1 *et seq*, a state which has adopted a State OSHA Program must maintain adequate funding and may not diminish its level of enforcement activity below that existing at the time of the agreement with the federal government leading to adoption of a State OSHA Program.

31. Under 29 U.S.C. § 667 and 29 C.F.R. § 1901.1, *et seq*, a state with a State OSHA Program must provide for the development and enforcement of such standards as will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor, and state agents responsible for execution of such programs must have sufficient legal authority to enforce these standards.

32. Under 29 U.S.C. § 667 and 29 C.F.R. § 1902.3 *et seq*, states which have adopted State OSHA Programs are required to have a sufficient number of adequately

trained and qualified personnel necessary for the enforcement of standards to be at least as effective as under the Federal OSHA Act.

33. Under 29 C.F.R. § 1902.3 *et seq* states which have accepted State OSHA Programs are required to provide sufficient funds to make enforcement of their plans as effective as enforcement of the Federal OSHA Act.

34. On January 26, 1973, North Carolina's proposed plan for adopting and enforcing workplace safety and health regulations under a State OSHA Program received initial approval.

35. On October 6, 1976, the North Carolina State OSHA Program plan was certified as having completed all developmental steps.

36. Under N.C.C.S. § 95-126(b)(2)m, the North Carolina Department of Labor is designated as the agency required by law to administer OSHANC.

37. N.C.G.S. § 99-133 creates and establishes within the North Carolina Department of Labor a division known as the office of Occupational Safety and Health (sometimes called "North Carolina OSHA" herein).

38. Under N.C.G.S. § 95-133, the Commissioner of Labor is required by law to appoint a Director to administer North Carolina OSHA, subject to the direction and supervision of the Commissioner of Labor.

39. Under N.C.G.S. § 95-133, the Director has the legal duty to carry out the responsibilities of the State under the State OSHA Program.

40. Under N.C.G.S. § 99-133, the Director, subject to the approval of the Commissioner of Labor, is required to select a professional staff of qualified and competent employees to assist in the state-wide administration of OSHANC.

41. Under N.C.G.S. § 95-133, subject to the general supervision of the Commissioner of Labor, the Director

is made legally responsible for the administration and enforcement of laws, rules and regulations which it is the duty of North Carolina OSHA to administer and enforce including the power, jurisdiction and authority to, among other actions, do the following: (1) uniformly superintend, enforce and administer applicable occupational safety and health laws of the State of North Carolina; (2) make or cause to be made all necessary inspections, analyses and research for the purpose of seeing that all laws and rules and regulations which the office has the duty, power and authority to enforce are promptly and effectively carried out (3) make all necessary investigations, develop information and reports upon conditions of employee safety and health, and upon all matters relating to enforcement of this Article and all lawful regulations issued thereunder; and (4) issue all types of notices, citations, orders, and other pleadings, forms and notices necessary to enforce compliance with OSHANC.

42. Under N.C.G.S. § 95-4, the North Carolina Commissioner of Labor is required to appoint such employees in the various divisions of the Department of Labor as may be necessary to perform the work of the Department.

43. Under N.C.G.S. § 95-4, the Commissioner of Labor is required to make such rules and regulations as shall be necessary to properly carry out the duties imposed upon the Commissioner and the Department.

44. Under N.C.G.S. § 95-4, the Commissioner of Labor is required to secure the enforcement of all laws relating to the inspection of factories, mills, workshops, and other institutions and to appoint inspectors.

45. Under N.C.G.S. § 95-4, the Commissioner of Labor is required to inspect or cause to be inspected as often as practicable the factories and other establishments in this State where goods, wares or merchandise are manufactured, purchased or sold.

46. Under N.C.G.S. § 95-4, the Commissioner of Labor is required to enforce the laws and prosecute violation of the laws relating to such inspections.

47. Under N.C.G.S. § 95-136, to carry out the purpose and duties of OSHANC, the Commissioner of Labor, the Director of North Carolina OSHA, and their duly authorized agents are entitled to inspect workplaces and investigate whether violations of OSHANC exist.

48. Under N.C.G.S. § 95-137, the Director of North Carolina OSHA or his authorized representative has a duty to issue citations to an employer where there are reasonable grounds to believe that the employer has not fulfilled his duties as prescribed in OSHANC and the rules and standards promulgated thereunder.

49. Under N.C.G.S. § 95-138 and § 95-139, civil and criminal penalties are established for employer violations of OSHANC.

50. Under N.C.G.S. § 95-146, the Commissioner of Labor is required to furnish to the United States Secretary of Labor information and assurances that the State OSHA Program, North Carolina OSHA, is being administered by adequate methods and by standards and enforcement procedures which are and will continue to be as effective as federal standards.

51. Under N.C.G.S. § 95-150, the Commissioner of Labor is required to submit to the General Assembly a budget and request for appropriations to administer adequately the Occupational Safety and Health Act of North Carolina and to give satisfactory assurance that this State will devote adequate funds to the administration and enforcement of standards as required by the Federal OSHA Act.

Defendants' Breaches of Duty

52. Upon information and belief, defendants had an insufficient number of inspectors, inspections, and programs for planned inspection of industries, as found in an investigation conducted by the United States Department of Labor (sometimes "the United States Department of

Labor investigation") after the September 3, 1991 fire at the Imperial Food Products, Inc., plant in Hamlet.

53. In violation of the statutory, regulatory and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to provide or obtain adequate funding for enforcement of OSHANC.

54. In violation of the statutory, regulatory, and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to provide adequate personnel and plans for inspection pursuant to OSHANC.

55. As a result of the acts and omissions of defendants through their officers, employees and agents John C. Brooks, Michael D. Ragland, James A. Oppold, and others who were also required by law to provide adequate staffing for D.O.L. and North Carolina OSHA, defendants failed to staff, hire, train and retain an adequate number of inspectors to discharge the duties of defendants described herein and in the Federal OSHA Act, OSHANC, and other statutory and regulatory laws.

56. Upon information and belief, the North Carolina Department of Labor failed even to use funds made available by the Federal Government for the hiring and training of inspectors and the carrying out of inspections.

57. Upon information and belief, North Carolina OSHA has a high rate of vacancy among inspectors and many other performance deficiencies attributable to the acts and omissions of defendants through their agents in failing to provide adequate staffing.

58. Upon information and belief, defendants did not maintain the staffing level required by law and commensurate with available federal and state funding.

59. Upon information and belief, and as found in the United States Department of Labor investigation, defend-

ants focused inordinate resources on follow up visits to work sites already inspected, and diverted resources to pre-occupancy inspection of migrant labor camps, thereby leaving insufficient time and resources for unannounced general scheduled inspections of other companies, including the Imperial Foods plant in Hamlet, North Carolina.

60. Upon information and belief, North Carolina OSHA had serious operational deficiencies and was less effective than the federal program, as found in the United States Department of Labor investigation. Said deficiencies are a result of the failure of the North Carolina Department of Labor and North Carolina OSHA, through their agents, to discharge their statutory, regulatory and common law duties, including those owed to claimant and Brenda Gail Kelly, deceased.

61. Upon information and belief, North Carolina OSHA's administrative procedures were at the time of the Hamlet plant fire deficient and inadequate, as found in the United States Department of Labor investigation.

62. Upon information and belief, the programmed safety and health inspections conducted by defendant were insufficient, as found in the United States Department of Labor investigation.

63. Upon information and belief, defendants failed to carry out their duties under the Federal OSHA Act, the State OSHA Program, and OSHANC on a level at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

64. The defendants' failure to fulfill their statutory, regulatory and common law duties was the proximate and direct cause of the death suffered by Brenda Gail Kelly, deceased, and the damages suffered by claimant.

* * * *

73. The defendants, through their agents named herein, owed a duty to Brenda Gail Kelly to inspect the

Imperial Food Products, Inc., plant in Hamlet, North Carolina, and to require abatement of the hazards there, including of the hazards that led to the death of Brenda Gail Kelly. The defendants' failure to conduct such inspections or cause them to be conducted proximately and directly caused her death.

* * * *

78. The defendants negligently acted or failed to act in all manners alleged in paragraphs 1-77 of this Verified Claim and thereby unreasonably, oppressively and manifestly abused their discretion. Defendants were also negligent and abused their discretion in other manners, including, but not limited to, the following:

a. Defendants negligently failed to maintain safety standards at the same level as required by the Federal Government.

b. Defendants negligently failed adequately to staff, train, and maintain personnel, despite the availability of federal and state funds for this purpose, and negligently maintained an unacceptably high rate of vacancy among inspectors.

c. Defendants negligently failed to provide adequate funding for enforcement of OSHANC in violation of their statutory, regulatory and common law duties.

d. Defendants negligently failed to provide adequate plans for inspection pursuant to OSHANC in violation of their statutory, regulatory and common law duties.

e. Defendants negligently failed to use funds made available by the Federal Government and State Government for the hiring and training of inspectors and the carrying out of inspections.

f. Defendants negligently focused inordinate resources on follow up visits to work sites already inspected and negligently diverted resources to pre-occupancy inspection of migrant labor camps, thereby negligently leaving insufficient time and resources for unannounced general

scheduled inspections of other companies and work sites, including the Hamlet plant.

g. Defendants negligently failed to provide for the safe and healthful employment and places of employment of the decedent Brenda Gail Kelly at least as effective as that provided and required by the federal government pursuant to the Federal OSHA Act.

h. Defendants negligently failed to discharge their duties of inspection and enforcement under statutory, regulatory and common law, by not conducting regular inspection of the Hamlet plant, proximately causing the injuries and death of decedent, Brenda Gail Kelly.

i. Defendants in the exercise of reasonable care knew or should have known the history of noncompliance with the Federal OSHA Act by Imperial Food Products, Inc. in the Commonwealth of Pennsylvania, including as to the particular types of hazards Imperial Foods was cited for maintaining there—which hazards were also present at the Hamlet plant and which were a cause of the September 3, 1991 fire—and therefore should have regularly inspected the Hamlet plant, but negligently failed to do so at any time prior to the fire which took the life of Brenda Gail Kelly.

j. Defendants in the exercise of reasonable care knew or should have known of the previous fires at the Imperial Food Products, Inc., plant in Hamlet, North Carolina, but negligently failed to inspect said plant prior to the September 3, 1991 fire to determine whether the safety of the workers at that plant was being compromised.

k. Defendants negligently failed to conduct any inspection of the Hamlet plant prior to the September 3, 1991 fire, which inspection, if conducted, would have disclosed the violative conditions and defects and led to the issuance of citations and the abatement of hazards or the shutdown of the Imperial Food Products, Inc., plant in Hamlet, North Carolina. Defendants' negligent failure to conduct such inspections was a breach of their duties to

claimant and Brenda Gail Kelly and was a proximate cause of her death.

79. The acts of negligence complained of herein, and other acts of negligence by defendants which will or may be disclosed during discovery and trial of this action, were breaches of duty to claimant and Brenda Gail Kelly, deceased, and were the proximate and direct cause of her death, for which claimant is entitled to recover.

* * * *

WHEREFORE, claimant prays that he: (1) Have and recover of defendants damages in excess of $100,000.00 as a result of the negligent acts and omissions and the unreasonable, oppresive and manifest abuses of discretion by the deefndants, and (2) such other and further relief as may be appropriate.

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Petitioners' New Brief to the Supreme Court of North Carolina, dated 25 August 1997

SUPREME COURT OF NORTH CAROLINA

No. 81PA97

STONE, *et al.*,
Plaintiffs-Appellees,
v.
NORTH CAROLINA DEPARTMENT OF LABOR, *et al.*,
Defendants-Appellants.

From the Industrial Commission

PLAINTIFF-APPELLEES' NEW BRIEF

QUESTION PRESENTED

Defendants have presented three questions in their Petition for Discretionary Review and their New Brief to this Court. In light of the manner in which these issues are linked and the procedural posture of this case, plaintiffs view these issues as subparts of a single question:

> HAVE PLAINTIFFS STATED A CLAIM FOR NEGLIGENCE UPON WHICH RELIEF CAN BE GRANTED?

* * * *

B. *The Defendants' Legal Duties.*

Over twenty-five years ago, Congress enacted the Occupational Safety and Health Act of 1970, now codified at 29 U.S.C. § 651 *et. seq.* (1990) (sometimes "Federal OSHA Act"). Pursuant to that Act, the United States Department of Labor has established standards regulating workplace safety and has implemented enforcement mechanisms. Relevant portions of the Federal OSHA Act, as well as regulations promulgated thereunder and State occupational safety and health legislation, are set forth in the appendix attached to defendants' brief. [Footnote omitted.] As an alternative to federal administration, the Federal OSHA Act allows a state to assume responsibility for development and enforcement of occupational safety and health standards, provided that the state complies with federal statutory and regulatory conditions. 29 U.S.C. § 667 (1990).

A proposed state program (sometimes "State OSHA Program") must be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under the Federal OSHA Act. 29 U.S.C. § 667(c). Proposed State OSHA programs must provide for sufficient legal authority and qualified personnel to enforce standards and must have adequate funds devoted to administration and enforcement. *Id.* Only then may a State OSHA program be approved. Each state with an approved OSHA Program has a continuing obligation to provide safety standards, funding, and enforcement at least as effective as that provided under the Federal OSHA Act and regulations. 29 U.S.C. § 667 (c,f); 29 C.F.R. § 1902.3 *et. seq.*

On 26 January 1973, the United States Department of Labor gave its initial approval to North Carolina's proposed plan for adopting and enforcing workplace safety and health regulations. (R p 10, 38). It certified the North Carolina program as having completed all devel-

opmental steps on 6 October 1976. (R p 11, 38). The North Carolina Department of Labor (sometimes "Department of Labor") was designated as the state agency responsible for administering OSHANC. N.C.G.S. § 95-126(b); (R p 11, 38). The Division of Occupational Safety and Health ("North Carolina OSHA")—a department of the North Carolina Department of Labor—was established under N.C.G.S. § 95-133 and is charged with the duty of carrying out the North Carolina OSHA program. (R p 11-14, 38-41). OSHANC and the regulations promulgated thereunder incorporate into North Carolina law the same safety standards that the federal government implements, with some variations. *Compare* Title 29 of the Code of Federal Regulations *with* Title 13 of the North Carolina Administrative Code.

The Commissioner of Labor, who is the Chief Executive Officer and highest official in the North Carolina Department of Labor, is required by law to appoint a director whose duty it is to administer North Carolina OSHA, subject to the Commissioner's supervision. N.C.G.S. §95-133 (1993); (R p 11-12, 39-40). The North Carolina OSHA Director has the legal duty to carry out the responsibilities of the State under the State OSHA Program. N.C.G.S. § 95-133; (R p 11, 39). State law compels that there be competent and qualified employees to assist in the state-wide administration and enforcement of OSHANC. N.C.G.S. § 95-133; (R p 11, 39). Federal law also requires defendants to maintain adequate staffing to provide for the safety and health of workers. 29 U.S.C. § 667(c, f); (R p 10, 38).

It is the duty of the officers and agents of the North Carolina Department of Labor and North Carolina OSHA uniformly to superintend, enforce and administer occupational safety and health laws; to make all necessary inspections, analysis and research for purposes of seeing that all laws, rules and regulations are promptly and efficiently carried out; to conduct investigations and develop

information and reports; and to enforce compliance with OSHANC by legal process. N.C.G.S. § 95-133; (R p 11-12, 39-40). The Commissioner of Labor, specifically and by statute, is "charged with the duty" through inspectors and other assistants, to secure the enforcement of all laws relating to inspection of factories, mills, workshops, and other institutions, and to conduct inspections as often as practicable of factories and other establishments where goods, wares or merchandise are manufactured, purchased or sold. N.C.G.S. § 9514. (R p 12-13, 40). The Department of Labor has the authority to inspect workplaces, and the duty to issue citations where there are reasonable grounds to believe the employer has not fulfilled its obligations. N.C.G.S. § 95-136 through -137 (1193; (R p 13, 41). Federal law requires that this work by the State be caried out at least at the same level of effectiveness as the federal OSHA system provides. 29 U.S.C. § 667.

Funding levels are also mandatory. N.C.G.S. § 95-150 requires the Commissioner to submit to the General Assembly a budget and request for appropriations and to give satisfactory assurance that the State will devote adequate funds to administration and enforcement of OSHANC standards. Federal law also mandates that a State OSHA Program be adequately funded. 29 U.S.C. § 667.

C. *Defendants Breached Duties Owed to Plaintiffs.*

The foregoing state and federal statutes and regulations impose on defendants a legal duty to maintain the State OSHA Program at the same level of effectiveness as the Federal OSHA Program. 29 U.S.C. § 667; (R p 9-10, 36-37). Yet, the United States Department of Labor investigated defendants' program as a result of the Hamlet fire and determined that they had failed to carry out their duties. (R p 14-18, 41-46). Significantly, Defendants failed to use funds that had been made available by the Federal Government for the hiring and training of inspectors and carrying out of inspections, and in fact refunded

money to the federal government. (R p 15, 42). By way of further example, the following constitutes other, but not all, of defendants' deficiencies:

1. Defendants had an insufficient number of inspectors.

2. Defendants conducted an insufficient number of inspections.

3. Defendants had insufficient programs for planned inspection of industries.

4. Defendants failed to provide or obtain adequate funding for the enforcement of OSHANC.

5. Defendants failed to provide adequate personnel for inspection.

6. Defendants failed to provide adequate plans for inspection.

7. Defendants failed to staff, hire, train and retain an adequate number of inspectors to discharge their duties.

8. Defendants maintained a hight rate of vacancies among inspectors and had many other performance deficiencies due to failing to provide adequate staffing.

9. Defendants did not maintain the staffing level required by law and commensurate with available federal and state funding.

10. Defendants focused inordinate resources on follow-up visits so that the same employers were being inspected repeatedly and other employers were not being inspected at all.

11. Defendants diverted resources to pre-occupancy inspection of migrant labor camps, leaving insufficient time and resources for unannounced general inspections of other employers.

12. Defendants maintained workplace safety at a less effective level than the Federal Program provides and requires.

13. Defendants had inadequate administrative procedures to monitor the OSHANC program. (R p 14-18, 41-46).

The United States Department of Labor's inquiry and investigation thus established serious violations of defendants' statutory duties under 29 U.S.C. § 667. This same conduct also demonstrates how seriously defendants violated North Carolina's statutory mandate for worker protection as set forth in N.C.G.S. § 95-4.

More importantly, by carrying out a completely inept OSHA program, defendants also breached their duties to the people working at the Imperial plant in Hamlet. (R p 23-24, 51). Though Imperial had been running the chicken processing plant since 1980, defendants never inspected it in the eleven year period it was operational. (R p 8, 35). They failed to do so even though two previous fires had occurred at the Hamlet plant.

* * * *

Had defendants fulfilled their legal duties to claimants, such as inspecting the plant at reasonable intervals during the previous eleven years, these conditions would have been discovered and corrected, and the catastrophic events of 3 September 1991 would never have occurred. (R p 2-24, 50-51). But defendants did not do what reasonable prudence and the statutes governing their existence required. Instead, they breached their duties to plaintiffs by failing to act at all before the fire. Now, twenty-five people are dead and at least eighty-one others injured as a result of defendants' negligence.

* * * *

[P]laintiffs here pursue claims based on negligent omissions. The Federal OSHA Act and North Carolina's OSHA Program impose on defendants the duty to develop standards at least as effective in providing safe and healthful employment and places of employment as provided under the federal OSHA program. 29 U.S.C.

§ 667. These statutes require defendants to conduct investigations, *id.*, and as often as practicable to inspect factories and other establishments where goods are manufactured, purchased or sold. N.C.G.S. § 95-4. The State has the duty to obtain sufficient funding and provide adequate personnel to enforce workplace safety laws and conduct inspections. 29 U.S.C. § 667. The General Assembly has, by statute, acknowledged defendants' duties to workers in N.C.G.S. § 95-126.

* * * *

* * * [Defendants] negligently failed to use information available from Federal OSHA to determine whether Imperial Foods was engaged in hazardous practices at its North Carolina plant as it had done at its Moosic, Pennsylvania plant, where Federal OSHA twice cited Imperial for burn or fire hazards between 1985 and 1987. The fact that federal inspections occurred at the Moosic plant twice in a two year period, compared to no inspections being conducted at the Hamlet plant in an eleven year period, is a compelling illustration of how defendants failed to fulfill their duties in a manner as effective as the Federal program.

Had defendants inspected the Hamlet plant at reasonable intervals as required by law, they would have discovered the hazardous conditions and brought the resources of the State to bear to protect the claimants. By not developing any reasonable plan for regular inspection of this facility, defendants breached their duties to plaintiffs. Rather than taking State action to protect the safety and health of the workers, as required by law, they did nothing. The Imperial plant thus became an inescapable tinder box, with the end result that over a hundred people were injured or killed. The Defendants' negligence was thus a proximate cause of the injuries suffered in the fire.

Though Imperial's negligent conduct in maintaining a premises where a fire was likely to occur may have been

the last act leading to a disaster, that fact is not a defense. Like the Department of Transportation in *Jordan,* the State's negligent failure to take advance corrective action was a proximate cause of this disaster. Even one minimal inspection effort would have prevented it from occurring. Had defendants enforced the requirements for sprinkler systems, the fire would never have gotten out of control. Had they enforced the requirement that the doors not be locked and blocked, the Imperial victims would have walked to safety. Because defendants negligently failed to carry out even these minimal inspections that would have led to a safe workplace, they breached their duties to claimants proximtely causing the Hamlet catastrophe.

B. *Defendants' Various Theories Do Not Bar Plaintiffs' Claims.*

In attempting to avoid their responsibilities to plaintiffs, defendants make a number of baseless technical arguments. They claim, among other "defenses," that they owed no duty to the workers of this State; and, in the alternative, that they may have owed a duty to the public, but not to any individuals. Stripped of its window dressing, defendants contention is that they owed plaintiffs no duties whatsoever and are therefore not liable to them or any workers in this State, regardless of how recklessly negligent and indifferent they were. Defendants' broad-based denial of their duties is unconscionable.

1. Defendants owed a duty of due care to plaintiffs.

Defendants claim that "a careful reading" of the governing statutes and administrative regulations reveals that the Federal OSHA Act is "enabling legislation" which "permits" but does not require a state government to develop workplace safety programs. (Appellants' Brief at 29). Thus, because they were not "required" to carry out any such actions, but undertook them freely, defendants owed duties only to Federal OSHA and not to the North Caro-

line labor force, including plaintiffs. (Appellants' New Brief at 29). This contrived analysis ignores the very purpose of federal and state worker safety statutes.

Once the State OSHA Program was adopted and approved, defendants were required to develop and enforce an occupational safety and health program providing for workplace safety at least as adequate as that provided by the Federal program. 29 U.S.C. § 667. OSHANC's legislative purpose is to protect the State's workers. *See, e.g.*, N.C.G.S. § 95-126(b); *Stone v. N.C. Dept. of Labor*, 125 N.C. 288, 292, 480 S.E.2d 410, 413 (1997). The same is true for Federal OSHA. 29 U.S.C. § 651. "OSHA is a remedial statute . . . to be liberally construed in favor of its beneficiaries." *Practico v. Portland Terminal Co.*, 783 F.2d 255, 261 (1st Cir. 1985). There can be no doubt that plaintiffs were among the intended beneficiaries of the federal and state OSHA acts. "One obvious purpose of this statute is to provide for the safety of the people who work in commercial establishments and to protect them from injuries in the workplace arising from unsafe conditions." *Stone*, 125 N.C. App. at 292, 480 S.E.2d at 410. Thus, defendants owed duties to North Carolina workers, not just to the Federal OSHA bureaucracy.

Because the State delegated administration of OSHANC to defendants, they were required to provide safety standards, funding, personnel and enforcement at least as effective as the standards, funding, personnel and enforcement provided by the Federal OSHA Act and regulations. 29 U.S.C. § 667; 29 C.F.R. § 1901.1 et seq.; *see also* 29 C.F.R. § 1902.3 et seq. Defendants' duties, which are ongoing and are subject to continuing review, 29 U.S.C. § 667(f), include adequate enforcement, such as regular inspections. 29 U.S.C. § 667(c) (3-4); 29 C.F.R. § 1902.3(d-h). These inspections were required to occur on a reasonably regular basis.

Given the purposes of OSHA and the States's mandate to provide for worker safety, it is irresponsible for defend-

ants to suggest that they owed duties only to Federal OSHA and none whatsoever to the people affected by their actions. Workers such as claimants, and not some administrative agency, are the intended beneficiaries of OSHA legislation.

* * * *

Where state and federal statutes and regulations require the State to take affirmative action and it fails to act, proximately causing injury to others, negligence is present. Its liability under the Tort Claims Act necessarily follows.

* * * *

5. Plaintiffs are not attempting to assert an implied right of action under Federal OSHA.

Defendants argue that the Federal OSHA Act does not create "an independent basis for a cause of action on behalf of the employee against either the plaintiff's employer or a third party who is not the plaintiff's employer." (Appellants' Brief at 30). Defendants' argument is off point and misapprehends plaintiffs' claims.

The Federal OSHA Act and OSHANC establish certain duties, violation of which can have effects both inside and outside the OSHA compliance system. For instance, committing an OSHANC violation can lead to the issuance of a citation. N.C.G.S. § 95-137 (1993). It is also evidence of negligence in a civil suit. *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 325, 291 S.E.2d 287, 290 (1982). In fact, egregious OSHANC violations are evidence that can help support a *Woodson* claim. *See Woodson v. Rowland*, 329 N.C. 330, 345, 407 S.E.2d 222, 231 (1991). Therefore, compliance with OSHA regulations is relevant to civil liability even though OSHA does not itself create an independent class of claims against employers.

Similarly, while OSHA does not set up a new and independent class of claims against the government, it is

pertinent to the State's negligence liability under another statute—the Tort Claims Act. When defendants fail to discharge their duties in the exercise of reasonable care, the State is liable just as an individual who violates a statute can be liable in negligence. For example, the motor vehicle code does not create an independent class of civil claims. Yet, traffic violations are nonetheless relevant in determining whether a driver has been negligent and is civilly liable. *Miller v. Lucas*, 267 N.C. 1, 147 S.E.2d 537 (1966). The guiding principle is that where a statute is enacted to protect a certain class of persons and a member of that group is injured, it is at least evidence of negligence and is in some circumstances negligence *per se*. *Id.; see also, e.g., Coleman*, 89 N.C. App. at 195-96, 366 S.E.2d at 7.

An independent statutory cause of action need not be created for the statute to be relevant, or even dispositive, as to the standard of care. In this case, plaintiffs were injured by defendants' failure to fulfill both their statutory duties and their duties of reasonable care owed to plaintiffs—members of the work force who are the beneficiaries of OSHANC. N.C.G.S. § 95-126(b). As such, defendants are liable under the Tort Claims Act.

* * * *

CONCLUSION

Wherefore, plaintiffs respectfully pray that this Court affirm the 4 February 1997 decision of the North Carolina Court of Appeals and remand this matter for trial on the merits.

This 25th day of August, 1997.

/s/ Charles L. Becton
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New Brief for State (Appellants) to the Supreme Court of North Carolina Dated 23 July 1997

SUPREME COURT OF NORTH CAROLINA
TENTH DISTRICT

No. 81PA97

STONE, *et al.*

v.

NORTH CAROLINA DEPARTMENT LABOR, *et al.*

From North Carolina Industrial Commission

NEW BRIEF FOR STATE
(Appellants)

* * * *

2. These Defendants Owe the Claimants No Duty Under FEDOSH.

Claimants assert that FEDOSH and its regulations, as well as OSHANC, established a duty of safety owed to them, individually, by the defendants Department of Labor and the Division of Occupational Safety and Health. (Claim ¶ 14.) Claimants recite numerous provisions of state and federal statutes and federal regulations which purportedly imposed a duty upon the defendants in

favor of the individual claimants. A review of these statutes and regulations in light of the applicable case law reveals that neither the federal statutes nor the regulations establish any such duty, and certainly not a duty in favor of these individual claimants.

A grant of authority to regulate does not impose a duty enforceable in tort:

> The assumption by the government of authority to regulate a particular activity should not render it liable in tort when it fails to exercise that authority to protect an individual from injury. *Zabala Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006, 98 S. Ct. 1876, 56 L. Ed. 2d 388 (1978).

Faust v. South Carolina State Highway Dept., 721 F.2d at 938-39. Thus, claimants must plead some specific statutory provisions which impose a specific duty upon these defendants in favor of the individual claimants.

In support of a purported duty arising from FEDOSH, claimants recite the FEDOSH provisions, codified at 29 U.S.C. § 651 *et seq.* and, specifically, the statutes and rules which permit the individual states to establish and enforce occupational safety and health programs in lieu of federal enforcement. *See* 29 U.S.C. § 667 and 29 C.F.R. § 1901.1 *et seq.* and Claim ¶¶ 26-33.

A careful reading of these statutes and implementing regulations indicate that these enactments establish no duty on behalf of the allegedly negligent state agency nor on behalf of the allegedly negligent officers and employees owed to any individual claimant. The statutes plainly constitute enabling legislation which permits a state government to develop a state program and standards which are as stringent as the applicable federal standards. FEDOSH and its rules establish a relationship between the Secretary of Labor and the appropriate state authority, with the Secretary of Labor or his subordinate official

exercising his judgment and discretion concerning a state program. Any duties owed by these defendants, or the named officers and agents, plainly stand owed to FEDOSH, not the individual claimants here. As the South Carolina Court of Appeals noted:

> The law presumes that a statute which creates or defines the duties of a public office has the essential purpose of providing for the structure and operation of the government or of securing the general welfare and safety of the public. These statutes are not intended primarily to protect discrete individuals from particular types of harm. In such cases, any actual benefit or injury to a particular individual from the performance or nonperformance of the duties of the office is incidental to the purpose of the statute. As a rule then, a statute creating duties of office imposes on the public officer no duty of care towards individual members of the public. *See Parker v. Brown*, 195 S.C. 35, 10 S.E.2d 625 (1940) (adopting the public duty rule as the law of South Carolina.)

Rayfield v. S.C. Dept. of Corrections, 297 S.C. 95, 105, 374 S.E.2d 910, 915 (S.C. Ct. App. 1988). Here, the statutes and regulations establish the structure of the state-federal relationship for state plan states. Neither these statutes nor these regulations establish any duty owed to particular employees, including these claimants.

Numerous decisions hold that neither FEDOSH nor its regulations establish an independent basis for a cause of action on behalf of the employee against either the plaintiff's employer or a third party who is not the plaintiff's employer. [Citations omitted.] These decisions rest upon the plain construction of FEDOSH as a whole, as well as the statutory provision found in 29 U.S.C. § 653(b)(4) which provides that FEDOSH neither enlarges nor diminishes "common law or statutory rights, duties, or liabilities."

Congress, in enacting FEDOSH, never intended to impose upon the government liability to an employee injured in a workplace accident. As noted earlier, FEDOSH places upon the employer a nondelegable duty to provide a workplace free from known hazards. *See* 29 U.S.C. § 654(a). Congress also assigned to employees the duty to comply with the Act. *See* 29 U.S.C. § 654(b). Congress did not include a section (c) assigning duties and liabilities to the government. The inclusion of employer and employee duties indicates an exclusion of governmental duties. *Expressio unius exclusio alterius. See In re Taxi Co.*, 237 N.C. 373, 75 S.E.2d 156 (1953). Secondly, the statute contemplates voluntary compliance by the employer, with spot checks only by the government. Congress never appropriated funds for the army of inspectors required had they intended the government to assume a duty to the employees for workplace safety. *See Dunlop v. Rockewll Intern.*, 540 F.2d 1283 (6th Cir. 1976). Congress plainly intended to rely upon spot checks for compliance, and fully recognized that the allocation of resources to spot check compliance by employers and employees would fall within the discretionary function exception to the Federal Tort Claims Act. Thus, Congress knew that the federal government would not be liable. [Citations omitted.]

The congressional intent and the stautory scheme found in FEDOSH as well as the plain language of 29 U.S.C. § 653(b)(4) and the interpreing case law all indicate that no private cause of action for damages arises against the federal government, or any other third party under the Act. Thus, these claimants fail to state a claim under FEDOSH.

* * * *

These defendants owed these claimants no duty, either at common law or by statute or by rule. The Tort Claims Act does not support an action of this nature. This Court should reverse the Industrial Commission's Order affirming Deputy Commissioner Alston's decision in this matter

and dismiss this action. The court of appeals erred by failing to do so.

Respectfully submitted this the 23rd day of July, 1997.

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Petition for Rehearing Filed With the Supreme Court of North Carolina Dated 13 March 1998

SUPREME COURT OF NORTH CAROLINA

No. 81PA97

STONE, *et al.*,
Plaintiffs-Appellees,

v.

NORTH CAROLINA DEPARTMENT OF LABOR, *et al.*,
Defendants-Appellants.

From the Court of Appeals COA96-207

From the Industrial Commission Nos. TA-12975-TA13076, TA-13507-TA-13509, TA-13521

PLAINTIFF-APPELLEES' PETITION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs, by and through their undersigned counsel and pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, hereby petition the Supreme Court of North Carolina to rehear the captioned matter on the grounds that the opinion of the Court, announced on 6 February 1998, overlooks and misapprehends certain

points of fact and law which, when properly considered, compel the conclusion that plaintiffs have stated a claim upon which relief can be granted. * * *

* * * *

II. THE DECISION IN STONE MISINTERPRETS THE TORT CLAIMS ACT

The majority opinion invokes canons of statutory construction in aid of its interpretation of the Tort Claims Act. However, in reaching the conclusion that the Legislature intended by passing the Act to adopt the public duty doctrine as a defense to tort claims against the State, the Court overlooks and misapprehends many of the most pertinent canons that, when considered, compel a contrary conclusion. The Court's analysis fails to take into account the history and purpose of the Tort Claims Act, the chronology surrounding its amendments, and well-considered decisions interpreting the Federal Tort Claims Act and similar statutes in other jurisdictions. * * *

* * * *

B. *The Tort Claims Act's History Bolsters Plaintiffs' Position That the Legislature Did Not Intend to adopt the Public Duty Doctrine.*

* * * *

[A]t the time the Legislature amended the Tort Claims Act to allow recovery for negligent omissions, it did so with full knowledge that the North Carolina Department of Labor was charged with the duty to inspect under Federal and State occupational safety and health legislation. North Carolina received initial approval of its OSHA program in 1973 (R p 10, 38) and was certified as having completed all developmental steps in 1976 (R p 11, 38). At the time the General Assembly made negligent omissions actionable in 1977, the State OSHA program was operative, and the legislature knew defendants had a continuing obligation to provide safety standards, funding,

and enforcement at least as effective as that provided under the Federal OSHA Act and Regulations. 29 U.S.C. § 667 (c,f); 29 C.F.R. § 1902.3 *et seq.* * * *

* * * *

C. *Other Courts Have Consistently Rejected the Construction of the Term "Private Person" that this Court Employed in Stone.*

Much of the Court's analysis turns on the Tort Claims Act reference to a "private person." The Act provides that the State is liable "under circumstances where [it], if a private person, would be liable to the claimant in accordance with the laws of North Carolina." N.C.G.S. § 143-291. In denying the plaintiffs the right to proceed, the Court declares that "[p]rivate persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public." (Slip op. at 6) (emphasis in the original). Thus, it holds, the public duty doctrine bars plaintiffs' claims.

* * * *

[T]he Court's approach to construction of the Tort Claims Act has been discredited for over forty years, beginning with *Indian Towing Company v. United States of America,* 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122 (1955). The Federal Tort Claims Act, which preceded the North Carolina act, utilizes comparison with a hypothetical private person when evaluating liability of the Federal government. *Compare* 28 U.S.C. § 2674 *with* N.C.G.S. § 143-291. Many states have tort claims legislation that track the federal act. In fact, this Court has relied on the Federal Tort Claims Act and cases interpreting it as a guidepost for understanding our own legislation since at least 1953. *See Lyon & Sons,* 238 N.C. at 32-33, 76 S.E.2d at 559. It is appropriate to continue that tradition here.

In *Indian Towing,* the United States Supreme Court considered claims brought under the Federal Tort Claims

Act. It construed that portion of the legislation providing that liability is to be imposed on the United States "in the same manner and to the same extent as a private individual under like circumstances." *Id.* at 64, 100 L. Ed. at 53, 76 S. Ct. 122 (quoting 28 U.S.C. § 2674). At the time of the *Indian Towing* decision, the Coast Guard was the only entity with the authority to establish and operate lighthouses. *Id.* at 66, 100 L.Ed. at 54, 76 S.Ct. 122. Because of this uniquely governmental role, the United States argued that it was not liable for the Coast Guard failing to maintain a lighthouse properly. Its contention was that the Tort Claims Act "must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligence in performance of 'uniquely governmental functions.'" *Id.* at 64, 100 L.Ed. at 53, 76 S.Ct. 122.

The Supreme Court rejected this argument. In fact, it considered it to be an attempt to "push the courts into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations" *Id.* The Court continued:

> [T]he fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts.

Id. at 65, 100 L. Ed. at 54, 76 S. Ct. 122. Thus, the Court would not import the "governmental function" grounds for avoiding liability into the Federal Tort Claims Act. Nor was the Court concerned that some actions giving rise to tort claims would result only from conduct that is exclusively "governmental."

> [I]f the United States were to permit the operation of private lighthouses—not at all inconceivable—the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no change in the character of the Government's activity in the places where it operated a lighthouse, and we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence of identical activity.
>
> While the area of liability is circumscribed by certain provisions of the Federal Tort Claims Act, See 28 U.S.C. § 2680, all Government activity is inescapable "uniquely governmental" in that it is performed by the Government. . . .
>
> There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation. . . . The broad and just purpose which the statute was designed to effect was to compensate victims of negligence in the conduct of governmental activities and circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

Id. at 67-69, 100 L.Ed. at 55-56, 76 S.Ct. 122. The Court thus allowed the claim to proceed.

Commentators have uniformly interpreted *Indian Towing* as rejecting the type of reasoning that the *Stone* Court has adopted. The Second Restatement of Torts provides:

> [T]he [United States Supreme] Court has held that an activity is not excepted from the Federal Tort Claims Act because of the fact that it is peculiarly governmental in character. The phrase limiting liability to the situation where "a private person would be liable" was held not to mean that the Government would be immune solely because the activity was one in which a private person would not engage.

Rest. 2d of Torts § 895A (*Comment B*). Prosser and Keeton similarly clarify the meaning of the "private person" analogy:

> One other matter still occasionally causes some difficulty. Since governmental entities are not liable unless they commit a tort, there must be a duty to act and a breach of that duty. This is frequently expressed by saying that the government is not liable where a private person is not. The principle is undoubtedly correct, but it lends itself to misapplication. *Governmental entities carry out many activities that are not carried on at all by private persons, but this is not to say that the Government escapes liability for the Coast Guard's negligence merely because private persons do not operate a Coast Guard.* It is not specific activities of the government that must find a counterpart in private life, but juridical acts, duties or relationships. The fact that private persons do not legally operate prisons should not mean public entities are free to operate them negligently; what is important is that private persons who have custody of others are under certain duties of care. But the point is easy to overlook.

Prosser and Keeton on Torts, § 131 *(Lawyer's Edition, 5th Ed., 1998 Supp.)*.

There is a close connection between decisions such as *Indian Towing* and those decisions refusing to recognize the blanket protection of the public duty doctrine. * * *

* * * *

The tort claims acts of Florida, the Federal government, and North Carolina are similar. The Florida act waived immunity for "personal injury or death caused by the negligent or wrongful act or omission of any employee within the scope of his office or employment under circumstances in which the state or such agency, if a private person, would be liable." *Id.* at 1013 (quoting Section 768.28 of the Florida Statutes) (emphasis added). Following the reasoning of the United States Supreme Court in *Indian Towing, supra,* the Florida court rejected the government's argument that there was no waiver of immunity as to uniquely governmental functions "since private individuals do not perform" them. *Id.* at 1016. "For the reasons articulated [in *Indian Towing*], we refuse to place such a gloss on our waiver statute. To do so would essentially emasculate the act and the salutary purpose it was intended to serve." *Id.* at 1017.

* * * *

IV. THE PUBLIC DUTY DOCTRINE HAS NO APPLICATION TO THE FACTS OF THIS CASE.

The public duty doctrine has no application to the facts alleged in plaintiffs' verified claims. The cornerstone of plaintiffs' claims is that defendants did not inspect the plant during the eleven year period it was operational despite having actual or constructive notice of previous fires, employer misconduct, and the highly dangerous conditions existing there. It is this notice, combined with a failure to inspect in compliance with State and Fdeeral law, that forms the factual basis of the claims. The majority opinion overlooks or misapprehends this point as it focuses on a proposition which was never pled nor argued by plaintiffs: that allowing these claims to proceed would

"judicially impose an overwhelming burden of liability on defendants *for failure to prevent every employer's negligence* that results in injuries or deaths to employees." (Slip. Op. at 11; emphasis added). This concept of strict liability is not found in the plaintiffs' papers, and is, in fact, specifically rejected as a theory at page 33 of the Plaintiff-Appellees' New Brief.

* * * *

Defendants had a duty to act under the State and Federal laws governing their functions. They negligently failed to do so, proximately causing the Hamlet disaster. Because the public duty doctrine is inapplicable, their conduct is actionable.

* * * *

VI. THE COURT'S REASONING MISAPPREHENDS THE LEGISLATIVE SCHEME.

The Court's opinion expresses certain policy concerns which can only arise from a misapprehension of the plaintiffs' claims, the statutory framework underlying occupational safety and health laws, and of the proper roles of the various branches of government in the polity of this State. The fact of the matter is that defendants' responsibilities for inspection were not written on a clean slate.

They did not independently conclude it would be beneficial to the State to have occupational safety and health laws, undertake this obligation, and create their own enforcement standards. Rather, they asked the Federal government to stay out of this business in North Carolina and, in exchange, voluntarily assumed an external standards of measurement—the requirement that their program be at least as effective as the federal OSHA program. 29 U.S.C. § 667 (c,f); 29 C.F.R. § 1902.3.

Yet, the Court cites the following language in support of its decision:

> "[A] government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, then not to have them at all." *Grogan* [*v. Commonwealth*, 577 S.W.2d 4,] 6 (emphasis added)

(Slip Op at 11).

The proposition is misapplied in this case. The choice in this case was not between having no legislation at all and having legislation that may help some workers, even if haphazardly enforced. Rather, the conscious decision the State made here was to reject federal enforcement of occupational safety and health laws by voluntarily undertaking the obligation to have a State enforcement program.

This situation renders the *Grogan* analysis meaningless. Nowhere in the federal legislation is it suggested that the State has the right to establish a program and enforce it "haphazardly" because that might be better for the State's workers than having no program at all. The State voluntarily undertook to assume occupational safety and health inspection tasks at a certain level of effectiveness and it failed miserably. The policy set forth in *Grogan* is inapplicable where, as here, the alternative was not an absence of legislation, but enforcement at a more competent level.

* * * *

CONCLUSION

WHEREFORE, plaintiffs respectfully pray that the Court allow their Petition for Rehearing, for the reasons set forth herein and in the certifications served herewith.

This the 13th day of March, 1998.

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